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IN THE

Supreme Court of the United States

October Term, 1965
No. 534

JOHN L. BATTAGLIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition of John L. Battaglia, for Rehearing of Decision Denying Certiorari to the Ninth Circuit Court of Appeals.

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To the Honorable Chief Justice, and to the Honorable Associate Justices of the United States Supreme Court:

John L. Battaglia, appellant and petitioner herein, respectfully petitions the court for a rehearing of his Petition for Certiorari, pursuant to Rule 58, upon the grounds stated herein.

Opinions Below.

The opinion of the Court of Appeals is not yet reported, but it is contained in petitioner's Petition for Certiorari. No opinion was filed on the denial of certiorari. Petitioner stands convicted of violating Title 18 U.S.C., Section 1343 (fraud) and is presently under a sentence of ten years imposed thereon.

Jurisdiction.

The Petition for Certiorari was filed on September 3, 1965, pursuant to 28 U.S.C. 1254(1), and was denied on December 13, 1965. This Petition for Rehearing is filed pursuant to Supreme Court Rule 58, and upon the Certificate of Counsel attached.

Question Presented.

(a) The petition herein presents the basic question whether a co-defendant in a joint trial (Battaglia) has the standing to question the deprival of the constitutional rights of the other co-defendant (Tenner) regarding testimony coerced from Tenner without counsel before the grand jury, in violation of the Fifth and Sixth Amendments, U. S. Constitution.

The recent decision of the Supreme Court of California, *People v. Aranda* (November 12, 1965), 63 A.C. 542, by Chief Justice Rodger Traynor, holds that the nonconfessing co-defendant may raise the objection as to the deprival of the constitutional rights of the confessing co-defendant. See comment, Time Magazine, December 24, 1965, page 31, attached hereto as Exhibit A.

(b) A secondary question is also presented, whether the use of the grand jury testimony of the co-defendant Tenner secured in violation of the Fifth and Sixth Amendments, U.S. Constitution, constitutes reversible error, where the tainted grand jury testimony was assertedly used for impeachment of Tenner's trial testimony.

The Second Circuit recently ruled adversely to petitioner on this point, see *Curry v. U.S.* (December 23, 1965). The point is ripe for consideration by the U.S. Supreme Court, thus commending favorable action for a rehearing of the original Petition For Certiorari to resolve these important principles of constitutional law.

GROUNDS OF PETITION FOR REHEARING.

(1) Tenner's Grand Jury Testimony Violated Fifth and Sixth Amendments.

The grand jury testimony of co-defendant Tenner, was secured in violation of Tenner's constitutional rights. At the time he was called as a witness before the grand jury, Tenner did not know that he was a potential defendant, and did not have an attorney at the time. No warning regarding his right to counsel, and no provision for counsel was accorded him, all in violation of the Fifth and Sixth Amendments, U.S. Constitution, see Reporter's Transcript page, 643, and pages 631-636, and 639.

His testimony was hesitant and evasive, and he refused to answer a number of questions on the basis of self-incrimination. The proceedings were conducted in an atmosphere of coercion.

See *Massiah v. U.S.* (1964), 377 U.S. 201, 84 S. Ct. 1199; and *Escobedo v. U.S.* (1964), 378 U.S. 478, 84 S. Ct. 1758, condemning use of confessions secured without counsel in violation of the Sixth Amendment. The rule is applicable to the instant Tenner grand jury proceedings conducted without counsel. While Tenner refused some answers as self-incriminatory, he was sadly in need of counsel [Rep. Tr. pp. 631-636]. Hence, the entire grand jury proceeding was tainted, and the Tenner testimony could not be constitutionally used for any purpose.

(2) Petitioner Battaglia Raised the Constitutional Objection in the Courts Below.

During the trial of the cause, petitioner objected to the Tenner grand jury testimony stating, "because we feel it is highly prejudicial to the other defendant (petitioner) under the circumstances," [Rep. Tr. p. 632].

Petitioner thereafter twice moved to strike the Tenner grand jury testimony "because he was not informed he was a potential defendant and he was not represented by counsel" [Rep. Tr. pp. 645, 678], which motions were denied by the trial court. The matter of the Fifth Amendment was discussed by counsel [Rep. Tr. pp. 647 and 678].

Petitioner on appeal, Appellant's Opening Brief, page 49, presented the point as follows:

> "VII
>
> THE COURT ERRED IN PERMITTING PORTIONS OF THE TRANSCRIPT OF THE TESTIMONY OF HAROLD TENNER BEFORE THE GRAND JURY ON OCTOBER 30, 1963, TO BE READ TO THE JURY IN THIS CASE AND IN DENYING THE MOTION TO STRIKE THE SAME.
>
> At the close of the Government's case in chief the defendant Harold Tenner took the stand to testify for the defense. Some of the testimony given by him was in conflict with his testimony before the Grand Jury on October 31, 1963, and on cross-examination over the strenuous objections of counsel for Battaglia, the Government attorney was per-

mitted to read portions of the Grand Jury transcript to impeach Tenner. [RT. 631-636, 639, 642] This was highly prejudicial to the defendant Battaglia as well as to the defendant Tenner, and the court erred seriously in permitting the same to be read. The court further erred in permitting the defendant Tenner to be examined as to statements made by him before the Grand Jury.

On cross-examination by attorney Abeles, Tenner testified that he was not represented by an attorney before the Grand Jury, nor did he consult with an attorney prior to going before the Grand Jury. Not only was the testimony of Tenner before the Grand Jury read over objections of counsel, but a motion to strike such testimony made by counsel for both defendants to strike that testimony was denied [RT. 667-668].

That the admission of such testimony and the denial of the motion to strike were erroneous is clearly established by the cases of *Massiah v. U.S.* and *Escobedo v Illinois,* supra., as well as in the very recent case of *People v Dorado,* 62 AC. (Cal) 350. The constitutional rights of Tenner, as well as Battaglia, were clearly violated under the *Fifth and Sixth Amendments of the United States Constitution* and the violation of such rights constituted reversible error."

Petitioner in his Petition for Certiorari, argued the right of petitioner to object to the Tenner grand jury testimony on the basis of the Fifth and Sixth Amendments, U.S. Constitution, see Petition for Certiorari, Point III, at page 20. Hence, the point has been preserved, and is now properly before the court.

(3) Government Contended and Circuit Court Ruled That Petitioner Could Not Raise Tenner's Constitutional Rights.

The government before the Ninth Circuit, contended that petitioner had no right to object. At page 49, Appellee's Brief, the government contended, "It is fundamental that one needs standing to raise a constitutional issue . . . No constitutional right guaranteed to Battaglia has been shown to have been violated."

The Ninth Circuit Court in the opinion below upheld the foregoing contention, as follows:

> "Appellant contends that Tenner's constitutional rights were violated because Tenner testified that he was not represented by an attorney before the Grand Jury nor did he consult with an attorney prior to going before the Grand Jury. Appellant relies upon Massiah v. United States, supra, and Escobedo v. Illinois, supra. We see no violation of appellant's constitutional rights in connection with the efforts of the Government to impeach the credibility of Tenner."

The government thereafter reasserted its earlier contention in opposing Certiorari in this court, see Brief for the United States in Opposition, page 8, as follows: "There was therefore no violation of Tenner's rights before the grand jury. *Petitioner would not, in any event, have standing to complain of any such violation.*"

We conclude that the grounds for rehearing are properly before the court on this Petition for Rehearing. The

California Supreme Court opinion of *People v. Aranda,* has attracted national attention on the precise point involved, see Time Magazine, December 24, 1965, page 31. This intervening circumstance occurred after the denial of Certiorari, and are of substantial and controlling effect, within the operation of Rule 58. The *California Aranda* ruling is in opposition to the denial of Certiorari herein. The conflict should be resolved. Further, necessity for granting a rehearing arises from the December 23, 1965 decision filed by the Second Circuit, *Curry v. U.S.,* on the use of unconstitutional tainted evidence by way of impeachment. While this ruling is adverse to petitioner, nevertheless the subject of joint trials, confessions, and witness impeachment is ripe for consideration and should be adjudicated at this time. These intervening circumstances fulfill the requirements of Rule 58 for a rehearing.

ARGUMENT.

POINT I.

In a Joint Trial, Nonconfessing Co-Defendant May Raise Constitutional Objection as to Confession.

According to *People v. Aranda* (November 12, 1965), 63 A.C. 542 at 551, petitioner herein may object to the tainted confession of a co-defendant. The same rule would apply to the use of tainted testimony before the grand jury, for the constitutional principle is the same.

The best and latest argument on the subject is made by California's brilliant Chief Justice Roger Traynor in said *People v. Aranda* (November 12, 1965), 63 A.C. 542 at 550, as follows:

> "Whether or not these criticisms of the present rule (admission of confessions in joint-trials) require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him. At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them.[4] *When, however, the confession implicating both defendants is not admissible at all, there is no longer*

---

[4]In this compromise the defendant must bear the risk that regardless of its efforts, the jury may subconsciously merge all the evidence. "A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and liability of the jury to separate the sheep from the goats." (United States v. Fradkin, (2d Cir.) 81 F. 2d 56, 59.)

room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. (People v. Gonzales, 136 Cal. 666, 668-669; see Greenwell v. United States (D.C. Cir.) 336 F.2d 962, 968-969; People v. Donovan, 13 N.Y.2d 148, 151 [243 N.Y.S.2d 841 193 N.E.2d 628]; People v. Waterman, 9 N.Y.2d 561, 567 [216 N.Y.S.2d 70, 175 N.E.2d 445]; compare People v. Rudish, 294 N.Y. 500 [63 N.E. 2d 77] with Malinski v. New York, 324 U.S. 401, 410-412.) The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him (see People v. Parham, 60 Cal.2d 378, 385) preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant.

In the present case, however, it is reasonably probable that a result more favorable to Aranda would have been reached had Martinez's confession been excluded. The error therefore resulted in a miscarriage of justice. (Cal. Const., art. VI, §4½; People v. Watson, 46 Cal.2d 818, 836.) There was a direct conflict in the evidence, and both defendants denied their guilt. In his argument to the jury, the prosecutor linked the cases of the two defendants together and in effect urged Martinez's confession as evidence against Aranda.

Since the judgments must be reversed, we consider other questions that may arise on retrial."

POINT II.

Fact That Tainted Testimony Was Offered for Impeachment Is Immaterial.

Where the grand jury testimony is tainted, it may not be used at all. The evidence is either pure or soiled, black or white, clear or dirty. This is especially so as against the nontestifying co-defendant. Petitioner did not testify before the grand jury or the trial court, and was prejudiced by the tainted testimony. While possibly the "mud pie" was not directly thrown at petitioner, yet it was he who was splashed, and it was petitioner whose fate was sealed by its effect. In the end, Tenner received a six-month sentence, and it is petitioner who presently is burdened with the ten-year sentence. His trial should not only have been fair—it should also appear to be fair.

The Second Circuit, *Curry v. U.S.* decided December 23, 1965, has ruled to the contrary on the impeachment issue. The Los Angeles Daily Journal, under date of January 4, 1965, carried the following news release on the decision, as follows:

> "NEW YORK (ACCN) — A confession which has been suppressed before trial on the ground it was illegally obtained can nevertheless be used at the trial to prove, not that the defendant is guilty, but that he told police a different story than that he recited on the witness stand—thus attacking his credibility—the U. S. Court of Appeals for the Second Circuit held in an opinion here, December 23.

> The opinion, written by Chief Judge J. Edward Lumbard and concurred in by Judges Leonard P. Moore and Paul R. Hays, also held that the confession in question had not in fact been illegally obtained, but this was irrelevant to the main point about the use of the confession to impeach the credibility of the defendant. The principle thus formulated will apply as precedent in future Second Circuit cases and perhaps in other federal (and state) courts in the U. S. *unless at some future time reversed by the U. S. Supreme Court.*"

The identical impeachment argument was advanced by the government in the Circuit Court, see Appellee's Brief, pages 49 to 52. The contention conflicts with the basic principle of *Messiah* and *Escobedo.* Where the prosecution tactics have become tainted, so have become the fruit. There can be no compromise on this fundamental constitutional principle. It offends the dignity of a great nation to so resort to "grey evidence" to convict.

The following from Chief Justice Traynor, *People v. Aranda* (November 12, 1965), 63 A.C. 542, quoting from Justice Frankfurter, in *Delli Paoli v. U.S.*, 352 U.S. 232, 77 S. Ct. 294, is on point as to the detrimental effect it has upon the administration of Justice to so prejudice the jury. Chief Justice Traynor states:

> " 'The admonition becomes a futile collocation of words and fails of its purpose as a legal pro-

tection to defendants against whom such a declaration should not tell. . . . The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (P. 247.) To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead, it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' towards juries. We treat them 'at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956), p. 105.)"

The instruction to the jury [Rep. Tr. p. 804, line 21], did not cure the error, or wipe the prejudice from the mind of the jury, wherein the trial court instructed:

"Otherwise any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement made."

POINT III.

Petitioner Was Actually Prejudiced by the Tainted Testimony.

The prosecution contended that petitioner as John Bender, and Tenner posing as Harry Morgan, duped the victim Dr. Warren into placing so called past post horse racing bets. That Tenner had originally denied the identity of Harry Morgan, and the making of the telephone calls and wagers went directly to the issue of guilt of petitioner. The Assistant United States Attorney Mr. Farber pointed up this contention to the court [Rep. Tr. p. 636], as follows:

> "Mr. Farber: We believe that the name 'Mellon' is important in this case, because of the posture that the case is or has taken. There is evidence and a statement from one of the defendants, that is defendant Tenner, that he never told Mr. Battaglia that he was Mellon, yet we have this conversation between Dr. Warrens and Mr. Battaglia pertaining to Mellon.
>
> This is a circumstantial step proving or going, one, to the truth of Mr. Tenner's statement, and it also further goes to the question of whether or not during the term of the scheme itself Mr. Battaglia and Dr. Warrens had not considered a man named Mellon as their contact."

The government contended that petitioner had given Dr. Warren the false name of Harry Morgan, and also his telephone number [Rep. Tr. p. 701] and the prosecution argued at Reporter's Transcript page 715:

> "He (petitioner) surely knew Harry Mellon, and if we are to believe any part of the story of Mr.

> Tenner, we are to believe that he was Harry Mellon, and of course, there is much other evidence in the record concerning that fact. Mr. Battaglia knew who Mellon was and Mr. Tenner knew who Battaglia was, and he knew who Dr. Warrens was, and they both knew about the past-posting scheme, the scheme to defraud, to defraud Dr. Warrens."

What petitioner said on the tape recording in evidence concerning Harry Morgan was also argued [Rep. Tr. p. 724, line 18]. The prosecution argued at length concerning the connection between Harry Morgan and petitioner [Rep. Tr. p. 767, line 16, and p. 781, line 15].

It follows that petitioner was irretrievably prejudiced by the tainted grand jury testimony, if prejudice in fact must be shown to vindicate the denial of rights under the Fifth and Sixth Amendments, U.S. Constitution, see *Fahy v. Connecticut* (1965), 375 U.S. 85, 84 S. Ct. 229.

Conclusion.

The grand jury testimony of co-defendant Tenner was tainted, because the proceedings were held in an atmosphere of hostility and coercion, and without counsel. Tenner did not know that he was the accused, and the government did not so inform him, and deliberately concealed that fact, even though the case had been fully investigated. The Sovereign employed the grand jury proceedings as a trap to insure conviction.

It is credulous to say that the grand jury testimony was offered solely to impeach Tenner, the nominal co-defendant. The prosecutor knew that once the "poison" was out, that petitioner's conviction was secure. Peti-

tioner was in fact convicted when the jury learned that Tenner had originally denied the Harry Morgan identity, wagers and the telephone calls before the grand jury.

It is equally credulous to contend that anything the trial court said in the instructions, could have possibly cured the prejudicial effect of the tainted testimony. Whether the jurors were "low grade morons" or "superhuman", the "poison" was out, and by use of the unconstitutional grand jury testimony, the conviction was secured. Thus the constitution was offended in this case.

The Fifth Amendment (due process) and the Sixth Amendment (right to counsel), mean exactly what they say. It is not a matter of semantics, but it involves the basic liberty and freedom of our people. The time has come for this court to resolve this important and far-reaching rule of criminal law involved in this Petition. The *California-Aranda* decision nationally publicized by Time Magazine, and *Curry v. U.S.*, nationally carried on the wire services, each point up the national interest in the questions presented by this petition. These recent happenings furnishes the "intervening circumstances of substantial and controlling effect," required by Rule 58 for favorable action.

The Petition for Rehearing of the Petition for Certiorari should be granted, and the matter should be set down for argument on the merits.

Respectfully submitted,

CARYL WARNER,
Attorney for Petitioner.

Certificate.

I do hereby certify that the foregoing Petition for Rehearing filed pursuant to Rule 58, is presented in good faith and not for delay, and that in my opinion, the ruling of December 13, 1965, denying certiorari conflicts with *People v. Aranda* (California, November 12, 1965), in which the undersigned served as Aranda's appointed attorney, and further, that the use of tainted testimony for impeachment, as pointed up by the Second Circuit decision of December 23, 1965, *Curry v. U.S.*, along with *People v. Aranda* have created national interest and importance to the questions presented, which questions should be resolved at once. I further certify that the within Petition for Rehearing is restricted to the grounds stated, to wit: that one co-defendant may urge the denial of constitutional rights of the other co-defendant, wherein a confession or grand jury testimony is secured in violation of the Fifth and Sixth Amendments, U.S. Constitution, and that the tainted testimony may not be used by the government, either in the case in chief, or thereafter as impeachment, or at all, and that *Delli Paoli v. U.S.* (1957), 352 U.S. 232, 77 S. Ct. 294, should be re-examined, reversed, and the Justice Frankfurter opinion be adopted, and that the opinion of California Chief Justice Roger Traynor in *People v. Aranda* should be adopted as the law of the land, the foregoing being the basis of this Certificate.

Dated at Los Angeles, California, this 5th day of January, 1966.

CARYL WARNER,
Attorney for Petitioner.

THE LAW

THE SUPREME COURT

Voluntary Prayer?

At milk-and-cookies time each morning, the kindergarten pupils of New York City's P.S. 184 recited a childish grace: "God is great, God is good, and we thank him for our food. Amen." Each afternoon they prayed:

Thank you for the world so sweet,
Thank you for the food we eat,
Thank you for the birds that sing—
Thank you, God, for everything.

In 1962, Principal Elihu Oshinsky stopped the prayers in keeping with the Supreme Court's decisions against compulsory religious exercises in public schools. Appalled, 15 parents—Protestant, Catholic and Jewish—organized PRAY (Prayer Rights for American Youth) and sued in federal court, claiming that their tots had a constitutional right to "voluntary" school expression of "their love and affection for Almighty God."

Voluntary? Not quite, countered Principal Oshinsky. The teachers taught those five-year-olds to say those prayers, which means, he said, official coercion, however benign. When the case reached the U.S. Court of Appeals for the Second Circuit, it avoided the voluntary question by ruling simply that the First Amendment does not compel a state to let citizens pray in a state-owned facility whenever they wish to do so. Judge Henry J. Friendly told PRAY: "The plaintiffs must content themselves with having their children say these prayers before 9 a.m. and after 3 p.m."

Last week the Supreme Court silently refused to review PRAY's appeal from Judge Friendly's decision. Though it signifies neither approval nor disapproval, the court's action suggests that it has no intention of reconsidering its original prayer decisions—a move for which PRAY's "voluntary" argument might have opened the way. As a result, the only prayers still permissible in U.S. public schools are those that a student says to himself.

FUGITIVES

Monstrous Mackerel

For 32 months, Harlem's Democratic Congressman Adam Clayton Powell has taxed more than 70 judges with his legal evasions of a $46,500 defamation judgment won by Mrs. Esther James, a widow whom Powell slandered on TV as a "bag woman" for gambling payoffs. Last week acting New York State Supreme Court Justice Maurice Wahl rewarded Powell's "monstrous defiance of the law" by awarding Mrs. James the whopping sum of $575,000.

A year ago, Mrs. James charged that Powell evaded attachment for the judgment by fraudulently transferring title to his $50,000 house in Puerto Rico to his wife's aunt and uncle. Twice, Powell ignored fact-finding trials. Last week, forced to assume that the charge was true, Justice Wahl ordered Powell to pay Mrs. James $75,000 in compensatory and $500,000 in punitive damages. Summing up his opinion of Powell, Justice Wahl indignantly paraphrased a famous insult attributed to Virginia's 19th century Senator John Randolph: "He is a man of splendid abilities, but he shines and stinks like rotten mackerel by moonlight."

CRIMINAL JUSTICE

Another Confession Problem: Unjoining the Joint Trial

As if the continuing U.S. confession controversy were not complicated enough, now the custom of joint trials has surfaced to compound the confusion. When a crime involves more than one defendant, most prosecutors aim to try them together; indeed, joint trials have occurred in many of the most famous U.S. criminal cases. But what if one defendant's confession implicates another? Is the use of such evidence so unfair to a man who has not confessed that it must be excluded?

The question arises because of a jewelry-store holdup in Los Angeles, after which the police arrested Henry Martinez and his alleged accomplice, John Aranda. At their joint trial, a policeman testified that Martinez had confessed, implicating Aranda. The judge followed a common practice: he ruled Martinez's confession admissible, but warned the jury not to consider it as evidence against Aranda. Not surprisingly, however, the jury found both men guilty of first-degree robbery.

Acting under its broad new confession doctrine (*People* v. *Dorado*), the California Supreme Court has voided Martinez's confession on the ground that the police failed to warn him of his rights to silence and to counsel as soon as they had other solid evidence against him—his fingerprints at the scene of the crime. In effect, that reversal also destroyed the case against Aranda—and spurred the court to confront the whole problem of how confessions should be handled in joint trials.

Brainwiping. In 1957 the U.S. Supreme Court ruled by a vote of 5 to 4 that federal juries could be trusted to follow judges' instructions and compartmentalize the evidence against codefendants, because otherwise "the jury system does not make sense." But in that decision (*Delli Paoli* v. *U.S.*), the four dissenters argued, in the words of Justice Felix Frankfurter, that whatever is said in joint trials "cannot be wiped from the brains of the jurors." And this year the court seemed to lean toward the Frankfurter attitude as it struck down a similar kind of mental gymnastics: the old custom of asking the same jury to determine both the validity of a confession and the confessor's guilt or innocence. Even if the confession proves to have been coerced, how can a jury ignore what it says? In *Jackson* v. *Denno*, the court ruled that the judge must determine a confession's voluntariness before the jury may hear it (TIME, Jan. 22).

Speaking for the California court in the Martinez-Aranda case, Chief Justice Roger Traynor took his cue from *Jackson* and reversed Aranda's conviction on the ground that a jury cannot "segregate evidence into separate intellectual boxes." In short, said Traynor, if A confesses that he committed criminal acts with B, the jury cannot "effectively ignore the inevitable conclusion

Down with mental gymnastics.

that B has committed those same criminal acts with A." From now on, ruled Traynor, California courts must handle codefendant confessions according to new procedures:

▶ Confessions are permissible in joint trials if all incriminating references to other defendants are "effectively deleted" from the confession in question. In Aranda's case, it would have sufficed merely to delete his name from Martinez's confession because the confession contained no other clue to his identity.

▶ When one defendant's confession so completely involves another defendant that "effective" deletion is impossible, the judge may grant a defense motion for separate trials. If the defense motion is not granted, the confession must be excluded at the joint trial.

California's decisive attack on joint trials is sure to alarm those prosecutors for whom the practice has been a standard tactic. But Chief Justice Traynor says that rules similar to California's have already proved workable in Ohio, Illinois and Connecticut. Whether the U.S. Constitution requires them for all states is a question for the U.S. Supreme Court.

EXHIBIT A